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State of Utah v. Gerald Glen Bell : Reply Brief

Utah Supreme Court

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870150

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,)	
)	REPLY BRIEF
Plaintiff/Respondent,)	
)	Argument Priority
vs.)	Classification No. 2
)	
GERALD GLEN BELL,)	Case No. 870150
)	
Defendant/Appellant.)	
)	
)	

APPEAL FROM A VERDICT OF GUILTY ENTERED IN THE
FOURTH JUDICIAL DISTRICT COURT OF MILLARD COUNTY, STATE OF UTAH

THE HONORABLE GEORGE E. BALLIF, DISTRICT JUDGE

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STATE OF UTAH,
Plaintiff/Respondent,
vs.
GERALD GLEN BELL,
Defendant/Appellant.

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REPLY BRIEF

Argument Priority
Classification No. 2

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SUMMARY OF ARGUMENTS

POINT I: The traditional discretion of a prosecutor is whether and what to charge. Section 78-3a-25(6) allows a prosecutor to decide whether to file, what to file and in which court to file the charge. Defendant's liberty interest is subject to strict scrutiny and the arbitrary and standardless decision of the prosecutor of which court to file in is not narrowly tailored to the State's compelling interest of providing serious juvenile offenders with lengthy supervision and protecting the public from such offenders, nor does 78-3a-25(6) meet the rational basis test.

POINT II. The issue of whether the Juvenile Court's denial of a Motion to Recall is a final appealable order is raised for the first time on appeal and should not be considered by the court. In the alternative, an order denying recall of a juvenile is not a final appealable order inasmuch as the denial of the Motion does not terminate jurisdiction, does not finally foreclose treatment as a juvenile, does not result after a full investigation and hearing, opens the possibility for piecemeal review, does not end the litigation or dispose of the case as to all parties on the merits and invites delay, expense and burdens upon the court.

Even if the order is a final appealable order, the defendant's attack of a district court's jurisdiction based on an unconstitutional statute was properly brought before the district court and these issues are preserved for appeal.

POINT III. Conditioning the remand of a juvenile to the Division of Youth Corrections on the approval of the Division of Youth Corrections after Judgment is not a proper delegation of legislative power. The legislature has no authority to make individual decisions, only to make rules by which individual decisions are made. The legislature therefore cannot delegate to the executive branch the power to determine on a case by case basis whether juvenile treatment for an individual is appropriate. It is a judicial function to determine the sentence after conviction and is a decision which cannot be delegated to the executive branch. Even if such delegation were proper, this delegation is not limited by sufficient guidelines or standards and does not meet constitutional requirements. The issue of defendant's standing to challenge the constitutionality of 78-3a-25(8) is raised for the first time on appeal and should not be considered by the court. Even if the court considers this issue the defendant has standing to challenge the constitutionality of the direct filing statute on its face by a Motion to Dismiss made prior to arraignment, inasmuch as the challenge went to the jurisdiction of the district court.

POINT IV. The issues raised by respondent in Point IV. were not before the court below and should not be considered for the first time on appeal. In the event the court treats these issues, the contentions raised in Point IV. by the State are without

merit. Because the second amended information charged the defendant with attempted second degree homicide during the commission of an aggravated robbery, the aggravated robbery charge merged into the second degree homicide charge. Even if an attempted commission of the aggravated robbery was sufficient for conviction on the second degree homicide charge, convicting defendant of both crimes would amount to conviction of the defendant on both the inchoate and principal offense, which is prohibited by 76-4-302. Because the aggravated robbery charge merged into second degree homicide, defendant's sentence for aggravated robbery should be vacated. The defendant should not be penalized for the State's errors in charging the defendant.

POINT V. The standard suggested by the State in Point V. is not a proper standard for amendment of informations after judgment and verdict. In any event the defendant was substantially prejudiced by proceeding to trial on the felony murder charge instead of the intentional murder charge included in the third amended information which was filed after judgment, verdict and sentence.

ARGUMENT

POINT I. THE COURT SHOULD HOLD THAT UTAH'S DIRECT FILING STATUTE VIOLATES THE EQUAL PROTECTION CLAUSES OF THE UNITED STATES AND UTAH STATE CONSTITUTIONS.

All references are to Utah Code Annotated, 1953 as Amended, unless otherwise noted.

The State argues that treatment as a juvenile is a privilege granted by the Legislature and that the Legislature can restrict or qualify the privilege as it sees fit, so long as there is not involved any arbitrary or discriminatory classification.

Whether juvenile treatment is a privilege or a right, laws passed by the legislature with respect to treatment as a juvenile may not violate constitutional provisions. The State does not deny that juveniles within the class are treated differently but attempts to justify the unequal treatment of juveniles under §78-3a-25(6) on the basis of prosecutorial discretion.

Whether or not to prosecute and what charge to file or bring before a grand jury, generally rests entirely in [the prosecutor's] discretion.

Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978). A prosecutor's traditional discretion is whether and what to charge and has not in the past included a choice of the court in which the charge is filed. The court in which a charge is filed is controlled by the charge and not by an arbitrary decision of a prosecutor. To allow the prosecutor to decide whether to file, what charge to file, and in which court to file the charges would allow the prosecutor to determine prior to a determination of guilt or innocence the possible punishment and procedural protections available to the juvenile. §78-3-25(6) allows one juvenile charged with one of the enumerated crimes to receive the protections of the juvenile system while a second juvenile charged with the same crime is prosecuted in the adult system. The juvenile proceeded against in juvenile court would be subject to the juvenile court's supervision until the age of 21, whereas the juvenile who is prosecuted as an adult may be imprisoned for life. The difference in procedures and possible punishments between the juvenile charged in adult court and the juvenile charged in juvenile court is supposedly permissible because of an arbitrary and standardless decision by the prosecutor as to

what procedures and punishments the juvenile faces. Prosecutorial discretion cannot salvage Utah's Direct Filing Statute.

The discretion of the prosecutor would not be limited by a holding that §78-3a-25(6) is unconstitutional. §78-3a-22 reads in relevant part:

- (1) Proceedings in childrens' cases are commenced by petition.
- (2) When ever the court is informed by a peace officer or any other person that a child is or appears to be within the court's jurisdiction, the probation department shall make a preliminary inquiry to determine whether the interests of the public or of the child require that further action be taken. On the basis of the preliminary inquiry the court may authorize filing of or request that the county attorney file a petition . . .

The county attorney under sub-section (6) of §78-3a-25 is allowed to file an information against a juvenile in district court only when a petition in the case of a person 16 years of age or older alleges one of the offenses enumerated in that section. If after the preliminary inquiry made pursuant to §78-3a-22(2), the juvenile court determines that further action be taken, the statute allows the county attorney to file a petition in the juvenile court. When this petition is filed, the county attorney exercises his discretion of whether and what to charge. At this point the traditional discretion of the county attorney has been exercised. The county attorney's discretion should not be expanded to allow him also to decide in which court to file. This in essence allows the county attorney to decide the procedural protections and possible punishment of the individual. Prosecutor's have traditionally been able to determine the punishment to which an accused would be subject to by choosing the charge filed against the accused. This discretion

of the prosecutor should be exercised in the same manner for juveniles, and in fact is exercised when the county attorney selects the charge to be included in the juvenile court petition. If the county attorney desires to prosecute a juvenile as an adult equal protection requires that the initial charge determine the court in which the juvenile will be prosecuted. The charge contained in the petition should govern the court in which the juvenile is prosecuted, not a second arbitrary and standardless decision of a prosecutor. Whether or not the above actually transpired in this case is not relevant to the Court's determination of whether or not the Utah Direct Filing Statute is unconstitutional.

It is not what has been done but what can be done under a statute that determines its constitutionality.

State v. Jarmillo, 83 New Mexico 800, 498 P.2d 687, 689 (1972).

The State also contends that physical liberty should not be held to be a fundamental right invoking strict scrutiny because if so every criminal statute would be entitled to strict scrutiny where ever it was challenged on equal protection grounds. This assertion is not well-founded. People v. Olivas, 131 Cal. Rptr. 55, 551 P.2d 375, (1976), and Matter of CH, 683 P.2d 931 (Mont. 1984), applied strict scrutiny to cases where the length of incarceration of the accused was in question. A similar holding by this Court that statutes effecting the length of incarceration of an accused are subject to strict scrutiny would not require every criminal statute to be reviewed under strict scrutiny whenever it was challenged on equal protection grounds. A further distinguishing fact in this case is that the challenged statute is a civil and not a criminal statute.

Langmeyer v. State, 104 Idaho 53, 656 P.2d 114 (1982) and Sosna v. Iowa, 419 U.S. 393 (1975), cited by the State to support the claim that even fundamental rights are not necessarily subjected to strict scrutiny, deal with the right to travel which has been declared fundamental. Langmeyer and Sosna accurately stated hold that the compelling state interest test is applied to laws impacting the right of interstate travel that deter migration and penalize the exercise of the right to travel. The Langmeyer Court expressly found that it was unlikely that the durational residency requirement at issue would deter a potential new resident from migrating and that the durational residency requirement did not in a constitutional sense penalize the right to travel. Therefore, strict scrutiny was not triggered. Langmeyer, at 117. The level of scrutiny was not addressed in the Court's Sosna opinion.

Contrary to the State's contention, Wells v. Childrens' Aid Society of Utah, 681 P.2d 199, (Utah 1984), did not uphold a statute effecting fundamental parental rights under a rational basis review. The Wells Court held that:

The proponent of legislation infringing parental rights must show (1) a compelling state interest in the result to be achieved and (2) that the means adopted are narrowly tailored to achieve the basic statutory purpose.

Wells at 206. Defendant is not aware of any Utah cases holding that something less than strict scrutiny applies when the statute challenged effects fundamental rights. The Court should hold as argued in Appellant's Brief that physical liberty is a fundamental right. Laws having an impact on the length of incarceration of an individual should be subject to the compelling state interest test.

The Court in the alternative should at least hold that an intermediate standard applies in this instance.

Defendant's concession that the State has a compelling interest in treating juveniles over the age of 16 charged with the offenses enumerated in §78-3a-25(6) is not fatal to defendant's equal protection attack. Defendant does not attack the statutory classification contained in 78-3a-25(6). It is the unequal treatment of members in a class created by the legislature that defendant attacks. If all juveniles charged in a juvenile court petition with the offenses enumerated in §78-3a-25(6) were filed against in district court, defendant would have no cause to attack the constitutionality of this statute. Defendant's objections arise because the 78-3a-25(6) allows differential treatment of juveniles within the class created by §78-3a-25(6).

The reasons advanced by the State for the Direct Filing Statute are that juveniles who have committed the serious crimes enumerated in 78-3a-25(6) will require lengthy supervision, and are a threat to public safety. However, the State advances no reason for allowing juveniles charged with the enumerated offenses to be dealt with differently. A statutory scheme such as 78-3a-25(6), which allows some individuals charged in a juvenile court petition with the enumerated offenses to remain in the juvenile system and face certification while others have an information filed against them directly in the district court is not narrowly tailored to achieve the basis statutory purpose of providing those individuals with lengthy supervision in the adult system beyond the age of 21 when the juvenile system loses jurisdiction. Such a statutory

framework cannot be upheld on the basis of prosecutorial discretion. Placing such discretion in the hands of the prosecutor in effect amounts to a delegation of legislative authority without standards and procedural safeguards which cannot be upheld. White River Shale Oil v. Public Service Commission, 700 P.2d 1088, 1091 (Utah 1985). Tested under the compelling state interest test, the means adopted in 78-3a-25(6) are not narrowly tailored to achieve the basic statutory purpose.

The defendant by failing to dispute for the purposes of a compelling state interest test that the State has a compelling interest in dealing with juveniles over the age of 16 who are charged with the offenses enumerated in §78-3a-25(6) did not intend and has not waived his right to challenge that the direct filing statute is unconstitutional if reviewed by the rational basis test. The State has not set forth a rational basis for the scheme which allows discrimination within the class created by the statute. Defendant so argued in Appellant's Brief at pages 20, 21 and 22.

Contrary to the State's contentions, §78-3a-25(6) does allow juveniles to be treated in radically different manners. A determination made at a recall hearing provided by §78-3a-25(9) does not even closely approach the certification hearing provided by §78-3a-25 sub-sections (1) through (5). Section 78-3a-25(9) with its constitutional infirmities is not a proper check on the discretion granted to the prosecutor under the statute. This is especially so in instances such as this where the defendant's Motion for Recall was denied. The risk of prosecution of a juvenile in adult court where the juvenile could be more appropriately dealt with in the

juvenile system is great here where the Recall Statute provides no finding or determination to be made by the Juvenile Court when the juvenile is brought before it at the recall hearing. An unconstitutional "safety valve" is no protection to the juvenile. §78-3a-25(6) violates the equal protection clauses of the United States and Utah State Constitutions.

POINT II. AN ORDER DENYING RECALL IS NOT A FINAL APPEALABLE ORDER AND DEFENDANT'S DUE PROCESS ARGUMENTS ARE PROPERLY BEFORE THE COURT.

The State contends that because the Juvenile Court's Order denying the defendant 's motion to recall was not appealed by defendant that defendant is precluded from asserting his due process argument on appeal. The State does not attack the Court's jurisdiction in this appeal, it merely contends that the Order denying recall was a final appealable Order and that a direct appeal should have been taken from the Juvenile Court and that the defendant is circumventing the regular appellate process by using a Motion to Dismiss in the Trial Court as a basis for the Court's review of defendant's due process arguments. The State's challenge is more accurately couched as a challenge as to whether or not the defendant's due process arguments are preserved for appeal. This contention was not before the District Court below. The Court therefore should not consider these arguments of the State which are raised for the first time on appeal. Bangerter v. Poulton, 663 P.2d 100, 102 (Utah 1983); Pettingille v. Perkins, 2 Utah 2d 266, 272 P.2d 185, 186 (1954); State v. Loe, 732 P.2d 115, 117 (Utah 1987); State v. Chancellor, 704 P.2d 579, 580 (Utah 1985); Lopez v. Shulsen, 716 P.2d 787, 788, 789, (Utah 1986); State v. Lee, 633 P.2d 48, 53

(Utah 1981); Rosenlof v. Sullivan, 76 P.2d 372, 374 (Utah 1983).

Without waiving defendant's objection to raising Point II of Respondent's Brief for the first time on appeal, defendant treats the issue raised in Point II of Respondent's Brief below.

The State contends that a motion denying recall is a final order from which an appeal may be taken. In support of its contention the State refers to an Order of the Utah Court of Appeals entered in State in Interest of Byrd, Utah Court of Appeals Case No. 880108-CA wherein the Court of Appeals determined that an order on motion to recall is a final appealable order for the reasons set forth in State In Re Atcheson, 575 P.2d 181 (Utah 1978). In Atcheson, the Court held that a certification order is a final appealable order. The Court relied heavily on the fact that jurisdiction was specifically terminated upon granting the State's motion to certify a juvenile to adult court and that the transfer of jurisdiction was irrevocable. The Court also relied upon the fact that various legislative and judicial protections were effectively and finally foreclosed by the certification order and that a full investigation and hearing is held in a certification proceeding. Atcheson at 182, 183. The Utah Court of Appeals' determination while persuasive is not binding upon this Court. For the reasons to be stated below the Court should reverse the Decision of the Court of Appeals and hold that an order on motion to recall jurisdiction is not a final appealable order.

The factors which the Court relied on in holding a certification order a final appealable order are not present in this instance. Jurisdiction in the juvenile court is terminated prior

to holding the recall hearing by the county attorney filing an information in the district court. At the time the recall hearing is held, jurisdiction over the defendant lies in the district court and not the juvenile court. The recall hearing is not a full investigation and hearing, rather, it is a cursory determination wherein the age of the defendant, the seriousness of offense, and the record of the defendant are taken into consideration. In addition, the legislative protections that have been developed for the juvenile are not effectively and finally foreclosed by an order denying recall. §78-3a-25(8) if found constitutional allows the district court an opportunity to commit a juvenile to the care, custody and jurisdiction of the Division of Youth Corrections. The reasoning of Atcheson is not applicable to the case at hand.

The Court has said that:

Parties to a suit generally are entitled to only one appeal as a matter of right . . . an appeal can be taken only from the entry of the judgment that finally concludes the action.

All Weather Insulation v. Amiron Development Corp., 702 P.2d 1176, 1177, 1178 (Utah 1985). A final judgment is one which ends the litigation and leaves no claim remaining for resolution. Tippetts v. Page Petroleum, Inc., 738 P.2d 635, 635 (Utah 1987).

A judgment to be final must dispose of the case as to all the parties, and finally dispose of the subject matter of the litigation on the merits of the case . . . A final judgment is a judgment which ends the controversy between the parties litigating.

North Point Consolidated Irrigation Co. v. Utah & Salt Lake Canal Co., 46 P. 824, 826 (Utah 1896). As can be seen an Order denying recall does not finally conclude the action in the district court. The issue as to the guilt or innocence of the defendant remains to

be litigated. Nor does an Order denying recall dispose of the case as to all the parties or finally dispose of the subject matter of the litigation on the merits. At the termination of the recall hearing the controversy between the State and the defendant remained outstanding. At the point when the recall hearing was denied the litigation was far from terminated.

The policy of the laws of the several states and of the United States is to prevent unnecessary appeals. It is not the policy of the courts to review cases by piecemeal. The interest of litigants require that cases shall not be prematurely brought to the highest court. The errors complained of may be corrected in the court in which they originated; or the party injured by them might notwithstanding the injury have final judgment in his favor. If a judgment interlocutory in its nature were the subject of appeal, each of the judgments rendered in the case could be brought before the appellate court, and litigants harassed by useless delay and expense, and the courts burdened with unnecessary labor. . . . The reason of the Rule is obvious. A party against whom an interlocutory order is made may have all his wrongs redressed and his rights protected upon a final hearing, and therefore he has no ground of complaint. If his rights are not protected on a final hearing in the trial court, the error can be corrected on appeal from the final judgment.

North Point Consolidated Irrigation Co., at 827. The points brought out in the above quoted passage are equally applicable here. Judicial economy necessitates that cases not be reviewed piecemeal. This is a real possibility in the context of a recall hearing. In the event the motion to recall is denied, the defendant is then entitled to appeal the Court's decision. If the Juvenile Court's recall order is reversed on appeal and the defendant is remanded to juvenile custody, the defendant may then be subjected to a certification hearing. 78-3a-25(9). In the event the defendant is certified to the district court, under Atcheson he may appeal the certi-

fication order. This would result in unnecessary delay, expense and burdens upon the Court that the rule against piecemeal review is designed to prevent.

A holding that the denial of a motion to recall jurisdiction is a final appealable order would allow an appeal from the Juvenile Court which has no jurisdiction and puts more emphasis on determining the penalty the juvenile will be subjected to than the primary purpose of the adjudication of the guilt or innocence of the defendant. An order denying recall disposes merely of a threshold jurisdictional issue and should be held to be interlocutory in nature.

A holding by the Court that an Order denying a motion for recall is a final appealable order is not fatal to defendant's due process challenge. The District Court's Ruling on the Motion to Dismiss specifically stated that the District Court had no appellate jurisdiction over the decision of the Juvenile Court. (R. 83). The determination made by the District Court on defendant's Motion to Dismiss, which was ordered by the trial judge (R. 88), was that the statute upon which the District Court had taken jurisdiction was constitutional. Defendant's challenge below goes to the District Court's jurisdiction based on the constitutionality of 78-3a-25(6), (8) and (9). The Court's ruling on defendant's Motion to Dismiss reserved the issue of the constitutionality of §78-3a-25(9). Contrary to the contention of the State, defendant may attack the constitutionality of the recall of jurisdiction statute on its face.

It is not what has been done but what can be done under a statute that determines its constitutionality.

State v. Jarmillo, 83 New Mexico 800, 498 P.2d 687, 687 (1972).

The defendant's due process arguments are properly before the Court and the Court should determine them. Section 78-3a-25(9), as well as the sentencing provisions of §78-3a-25(8) act as checks on 78-3a-25(6) and are such integral parts of the Direct Filing Statute that consideration of the constitutionality of the Direct Filing Statute cannot properly be considered while excluding consideration of the recall and sentencing provisions.

POINT III. SECTION 78-3a-25(8) IS NOT A PROPER
DELEGATION OF LEGISLATIVE POWER AND
DEFENDANT HAS STANDING TO CHALLENGE
ITS CONSTITUTIONALITY.

The State seeks to uphold §78-3a-25(8) on the grounds that requiring approval of the Division of Youth Corrections before a juvenile defendant can be committed to the Division of Youth Correction's custody is a proper delegation of legislative power. The State also claims that the defendant has no standing to challenge 78-3a-25(8)'s constitutionality. These issues are raised for the first time in Respondent's Brief and should not be considered by the Court. Bangerter v. Poulton, 663 P.2d 100, 102 (Utah 1983); Pettingille v. Perkins, 2 Utah 2d 266, 272 P.2d 185, 186 (1954); State v. Loe, 732 P.2d 115, 117 (Utah 1987); State v. Chancellor, 704 P.2d 579, 580 (Utah 1985); Lopez v. Shulsen, 716 P.2d 787, 788, 789, (Utah 1986); State v. Lee, 633 P.2d 48, 53 (Utah 1981); Rosenlof v. Sullivan, 76 P.2d 372, 374 (Utah 1983).

Without waiving defendant's objection to the Court's consideration of the State's arguments raised in Point III for the first time on appeal, defendant addresses the issues below:

The State claims that 78-3a-25(8) does not violate Utah's

Separation of Powers clause because it is within the power of the legislature to determine the appropriate sentencing alternatives that will be available to Judges and the legislature has delegated to the Division of Youth Corrections the power to determine the appropriate placement of juveniles in the interest of the juvenile and the public. Respondent's Brief, page 9. While defendant agrees that it is within the power of the legislature to determine the appropriate sentencing alternatives that will be available to Judges, it is a judicial function to decide a defendant's punishment after conviction among the alternatives given by the legislature. State v. Jones, 689 P.2d 561, 564 (Ariz. App. 1984). The legislature has the power to make, amend or repeal laws, the executive department enforces laws, and the judiciary interprets and applies the law in actual controversies. Vansickle v. Shanahan, 212 Kan. 426, P.2d 223, 235, (1976). The legislature has the power to make the law, but the judiciary has the power to interpret and apply the law in actual controversies. The legislature therefore has no power to determine the appropriate placement of juveniles on an individual basis. The legislature therefore not having the power to make individual decisions regarding an accused's sentence cannot delegate that judicial function to the Division of Youth Corrections. The legislature in essence has delegated the authority to determine the punishment of an individual to the executive branch of government. This is clearly a judicial function and impermissible under the separation of powers doctrine. It is the Division of Youth Corrections' Duty to execute a juvenile's sentence, not determine it.

[W]hen the decision to prosecute has been made, the process which leads to acquittal or sentencing is fundamentally judicial in nature, or, to state it another way, when the jurisdiction of a court has been properly invoked by the filing of a criminal charge, the disposition of that charge becomes a judicial responsibility. . . . [T]he decision to mitigate a sentence properly belongs to the Judge . . .

State v. Jones, supra.

While it is within the power of the legislature to determine the appropriate sentencing alternatives available to Judges, and the legislature can remove all discretion from a Judge in the imposition of a sentence, the legislature cannot take that discretion away from the Court and give it to another branch of government. A holding that conditioning a remand of the convicted juvenile to the Division of Youth Corrections on the approval of the Division of Youth Corrections does not violate the Constitution, is tantamount to telling the legislature that it may condition all of the court's sentences of convicted defendants on the approval of adult probation and parole. While it would be prudent for the Division of Youth Corrections to evaluate a juvenile defendant prior to sentencing and provide the court with its opinion as to whether treatment in the juvenile system is appropriate, once a sentencing alternative is given to the court it may not be unconstitutionally conditioned.

Even if as the State suggests, the legislature could properly delegate to the executive branch the discretion to choose the appropriate placement of juveniles on an individual basis, the delegation contained in 78-3a-25(8) is not a proper delegation supported by sufficient standards and procedural safeguards. In order for a legislative delegation to survive constitutional scru-

tiny, it must be "accompanied by adequate guiding standards and procedural safeguards to insure that decision making . . . is not arbitrary and unreasoned . . . " White River Shale Oil v. Public Service Commision, 700 P.2d 1088, 1091, (Utah 1985). 78-3a-25(8) contains no guiding standards or procedural safeguards to insure that the decision of the Division of Youth Corrections is not arbitrary and unreasoned. Even if the Division of Youth Corrections had made regulations according to 78-3a-25(8) the statute and regulations would be invalid because of the lack of guidelines and procedural safeguards. Nor is the Division of Youth Corrections decision subject to judicial review.

While the Utah Constitution does not forbid all delegations of power by the legislature to an executive branch, the attempted delegation in this instance is violative of Article V. Section I. of the Utah Constitution. See also State Ex Rel. Schillberg v. Cascade District Court, 94 Wash. 2nd 772, 621 P.2d 115 (1980) (prosecuting attorney could not validly exercise a veto over the Superior Court's decision to refer an accused to a deferred prosecution program. Such a decision imposed a sentencing alternative and involved fundamentally judicial acts, i.e. weighing of the allegations, hearing argument contrary to the petition, and resolving the disputes between the parties).

The State also claims that the defendant lacks standing to challenge 78-3a-25(8) on the grounds of separation of powers. Standing however is an issue which may not be raised for the first time on appeal. Smith v. Royer, 26 Utah 2d 83, 45 P.2d 664, 667 (1971); Fritz v. Western Union Tel. Co., 25 Utah 263, 280, 71 P.

209. See also Tyler Pipe Industries, Inc. v. State Department of Revenue, 105 Wash. 2d 318, 715 P.2d 123, 128 (1986). (If the issue of standing is not submitted to the trial court, it may not be considered on appeal); Torrez v. State Farm Mutual Automobile Insurance Company, 130 Ariz. 223, 635 P.2d 511, 513, Footnote 2 (Ariz. App. 1981) (Standing may not be raised for the first time on appeal).

In any event the defendant has standing to challenge the constitutionality of 78-3a-25(8) inasmuch as defendant's motion to dismiss, wherein the constitutionality of this statute and the District Court's jurisdiction was challenged was made prior to arraignment after the trial court ordered counsel to do so. (R. 88). The issue is properly reserved for appeal. A challenge of the entire direct filing system on its face prior to arraignment is an appropriate method to attack the constitutionality of the direct filing statute and the jurisdiction of the District Court, inasmuch as 78-3a-25(6) is tempered by both subsections 8 and 9. These sections are so inter-related that the court should consider the constitutionality of the entire statute. The court should also grant standing to the defendant because the issues involved in the constitutionality of 78-3a-25(6), (8), and (9) are of great public importance and ought to be judicially resolved. See Olson v. Salt Lake City School District, 724 P.2d 960, 962, (Utah 1986) (Footnote 1).

POINT IV. AGGRAVATED ROBBERY IS AN INCLUDED OFFENSE OF ATTEMPTED SECOND DEGREE HOMICIDE AND THE AGGRAVATED ROBBERY COUNT OF THE INFORMATION MERGED INTO THE ATTEMPTED SECOND DEGREE HOMICIDE CHARGE.

The issues raised by respondent in Point IV. of the State's brief are raised for the first time on appeal. The court therefore should not consider these arguments as they were not before the trial court. Bangerter v. Poulton, 663 P.2d 100, 102 (Utah 1983); Pettingille v. Perkins, 2 Utah 2d 266, 272 P.2d 185, 186 (1954); State v. Loe, 732 P.2d 115, 117 (Utah 1987); State v. Chancellor, 704 P.2d 579, 580 (Utah 1985); Lopez v. Shulsen, 716 P.2d 787, 788, 789, (Utah 1986); State v. Lee, 633 P.2d 48, 53 (Utah 1981); Rosenlof v. Sullivan, 76 P.2d 372, 374 (Utah 1983).

Without waiving defendant's objection to the contents of Point IV. of Respondent's brief being raised for the first time on appeal, defendant addresses the State's contentions below.

As argued in Points VI, VII, and VIII of Appellant's Brief, amending the second amended information under which defendant was tried was improper and defendant's Motion to Correct Sentence is not moot. Defendant was tried and convicted under the second amended information. Only after judgment had entered in this matter and the defendant was committed and filed a Motion to Correct Sentence did the State move to amend the information and enter a new sentence.

The State also argues that a completed aggravated [sic] burglary is not an included offense of attempted felony murder because the commission of felony murder does not require a completed aggravated robbery. However as charged in the second amended information, defendant was charged with a completed aggravated robbery and attempted second degree homicide in that defendant while in the commission of an aggravated robbery did attempt to

cause the death of another person. (R. 32, 33). The court in order to convict the defendant of attempted second degree homicide under the second amended information was required to find a completed aggravated robbery as charged in Count I of the second amended information. 76-5-203(1)(d) states:

Criminal homicide constitutes murder in the second degree if the actor; . . .

(d). While in the commission, attempted commission or immediate flight from the commission or attempted commission of aggravated robbery . . . causes the death of another person. .

While theoretically under this section a completed aggravated robbery would not be required for conviction of felony murder in the second degree, the State chose to charge defendant with attempting to cause the death of another person while in the commission of an aggravated robbery. As charged, proof of a completed aggravated robbery was required to convict defendant of attempted second degree homicide.

Even if the court finds that a completed aggravated robbery was not necessary in order to find the defendant guilty of attempted second degree homicide, the completed aggravated robbery of which defendant was convicted would still merge into the crime of attempted second degree homicide as charged by the State below. Utah Code Annotated, 76-4-302 states:

No person shall be convicted of both an inchoate and principal offense or of both attempt to commit an offense and a conspiracy to commit the same offense.

76-4-302 prohibits defendant in this action from being convicted of both attempted second degree homicide based on the predicate offense of attempted aggravated robbery and the offense of aggra-

aggravated robbery. To do so would amount to conviction of the defendant on both attempted aggravated robbery and aggravated robbery in violation of 76-4-302's prohibition against convicting a person of both an inchoate and principal offense and would amount to a double jeopardy violation.

The state finally urges that the defendant should be required to serve the sentence that is legislatively imposed for the greater degree of crime rather than for the lesser. However, State v. Shaffer, 725 P.2d 1301, _____ (Utah 1986) holds that:

First degree murder based on the predicate offense of aggravated robbery stands in a greater relationship to the lesser included offense of aggravated robbery. If the greater crime is proven then the lesser crime merges into it.

In the case at bar, aggravated robbery merged into the crime of attempted second degree homicide. As in Shaffer, 76-1-402(3) prevents the defendant from being convicted and sentenced for the predicate offense of aggravated robbery in addition to attempted second degree homicide where the aggravating circumstance is aggravated robbery. Because the aggravated robbery merged into second degree homicide, defendant's sentence for aggravated robbery should be vacated. The defendant should not be penalized for the State's errors in charging the defendant.

POINT V. AMENDING THE INFORMATION AFTER VERDICT,
JUDGMENT AND SENTENCE VIOLATED DUE
PROCESS, EQUAL PROTECTION AND DEFENDANT'S
RIGHT TO BE INFORMED OF THE NATURE AND
CAUSE OF THE ACCUSATION AGAINST HIM.

The State attempts to uphold the post verdict amendment of the information as not violating double jeopardy or due process by asking the court to allow amendments to informations after

erdict as long as the defendant's substantial rights are not prejudiced and no new offense is charged. This is the same standard underwhich pre-verdict amendments are allowed under 77-35-4(d). If the legislature had intended that amendments to informations after verdict would be allowed if the substantial rights of the defendant were not prejudiced and no additional or different offense is charged the legislature would have so stated in Section 77-35-4(d). However, the legislature specifically mandated that after verdict an information may be amended so as to state the offense with such particularity as to bar a subsequent prosecution for the same offense upon the same set of facts.

The cases cited by the State in support of the standard suggested by the State for post verdict amendments to informations do not support adoption of the suggested standard. In People v. Johnson, 644 P.2d 34 (Colo. App. 1981) the defendant moved for dismissal of the charge at the close of the People's case, on the basis that the information did not properly charge the offense. The prosecution then moved to amend the information, which Motion was granted over defendant's objection. Id. at 37. The facts of Johnson nowhere specifically state that the information was amended after judgment, sentence and verdict as in the instant case. The Johnson court states:

When amendment of an information is sought after trial, as in this case, it may only be permitted if it is one of form which does not prejudice any substantial rights of the defendant.

In support of this statement the court cites Collins v. People, 69 Colo. 353, 195 P 525 (1920). Collins v. People allowed an information to be amended upon motion of the State made during the

State's presentation of its case. Id. at 525. Because of the factual ambiguity in the Johnson case, and the fact that Collins dealt with an amendment made after trial began but before verdict, the court should not adopt the standard suggested by the State.

Regardless of whether the court adopts the standards suggested by the State, the defendant's substantial rights were prejudiced by allowing the filing of the third amended information. Defendant was tried on the second amended information and stipulated to facts for his trial on felony murder. The specific intent to kill is not required under 76-5-203(1)(d). Had intent been an issue under Count I of the information prior to trial, the defendant may not have stipulated to any facts showing intent and may have opted for a jury trial. By not having notice of the element of intent, the defendant was prejudiced in his defense. An argument by defendant's counsel that the gun was fired accidentally can hardly substitute for a trial on the merits. It is obvious that defendant was prejudiced by proceeding through the trial and sentencing under a charge that did not include the intent to kill only to have the information amended after trial, judgment and sentence to charge a crime requiring proof of intent.

The State also claims that the defendant was not convicted of a different offense than the one charged. However, the elements of intentional homicide in the second degree and attempted felony murder are so different that the court should find that intentional attempted criminal homicide and attempted felony murder are different offenses.

Contrary to the State's arguments the defendant was sub-

subjected to double jeopardy because of the amended information. Defendant has been convicted of attempted felony murder and attempted intentional murder. Presently there are two judgments outstanding, neither having been vacated. Defendant's substantial rights having been prejudiced, the court should hold that amendment of the information after judgment and sentence violated double jeopardy, due process and defendant's right to be informed of the nature and cause of the accusation against him.

CONCLUSION

The defendant respectfully requests that the relief requested in appellant's brief be granted.

DATED this 19th day of August, 1988.

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CERTIFICATE OF DELIVERY

I hereby certify that I delivered FOUR (4) true and correct copies of the foregoing Reply Brief this 19th day of August, 1988, to: David L. Wilkinson, Utah Attorney General, 236 State Capitol, Salt Lake City, UT 84114.


~~Secretary~~